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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KAITLIN DAYE, Plaintiff and Respondent, v. INTERNATIONAL SCHOOL OF COSMETOLOGY, INC., Defendant and Appellant.	G051562 (Super. Ct. No. 30-2014-00746443) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gail A. Andler, Judge. Reversed and remanded with instructions.

Duane Morris LLP, Aaron T. Winn and Heather U. Guerena for Defendant and Appellant.

Cohelan Khoury & Singer, Michael D. Singer and Jeff Geraci; Law Office of Leon Greenberg, Leon Greenberg and Dana Sniegocki for Plaintiff and Respondent.

INTRODUCTION

International School of Cosmetology, Inc. (ISC), has appealed from an order denying its petition to compel respondent Kaitlin Daye to arbitrate her lawsuit concerning alleged Labor Code violations. Daye sued ISC, claiming she had not been properly paid for the work she had done while enrolled in a beauty college. The trial court denied the petition to compel arbitration on unconscionability grounds.

We reverse. Although the arbitration provision has some degree of procedural unconscionability, because it is in a contract of adhesion, the provision is not "one-sided" or "overly harsh." In particular, its restrictions on discovery apply equally to both Daye and ISC, and Daye has not shown these restrictions to be more disadvantageous to her. Daye's other instances of unconscionability are meritless. We therefore remand the matter to the trial court with instructions to grant the petition with the alterations it identified in its initial ruling.

FACTS

Daye sued ISC, doing business as Toni & Guy Hairdressing Academy, for Labor Code violations relating to wage payments and meal and rest periods. The gist of her complaint was that while she was enrolled at Toni & Guy, she and other students were required to work in the school's hairdressing salon as part of their training. She alleged she and other students at the school were not paid minimum wage for all hours worked, were not paid for overtime or waiting time, did not receive their mandatory meal and rest periods, did not receive their wages on termination, and did not receive accurate wage statements. Her complaint is framed as a class action on behalf of herself and similarly situated students.[1]

Daye's enrollment agreement with ISC included an arbitration clause, which provided, "Any dispute arising from enrollment at Toni & Guy Hairdressing

[1] The trial court considered enforcement of the arbitration agreement only as it applied to Daye herself, not to a potential class. We likewise do not address the class arbitration issue.

Academy no matter how pleaded or styled, shall be resolved by binding arbitration under the Federal Arbitration Act conducted by the American Arbitration Association ("AAA"), at Costa Mesa, CA. under its Commercial [Arbitration] Rules. The award rendered by the arbitrator may be entered in any court having jurisdiction." The arbitration clause occurs on the last page, about half a page above Daye's signature, and is in all capitals except for the underlined portions.

ISC petitioned to compel Daye to arbitrate her dispute. The trial court denied the petition on unconscionability grounds, both procedural and substantive. The procedural grounds were based on the contract's adhesive nature and the placement of the arbitration provision. The substantive ground was the failure of the AAA rules to provide for discovery other than document production, and in particular the lack of pretrial subpoena power afforded to arbitrators by the Federal Arbitration Act (FAA).

DISCUSSION

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement – either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation [citation] – that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.)

"Absent conflicting extrinsic evidence, the validity of an arbitration clause, including whether it is subject to revocation as unconscionable, is a question of law subject to de novo review." (*Serpa v. California Surety Investigations, Inc.* (2013) 215

Cal.App.4th 695, 702.) If the court has resolved conflicts in the evidence or made factual inferences from it, we review those aspects of the determination for substantial evidence. (*Lhotka v. Geographic Expeditions, Inc*. (2010) 181 Cal.App.4th 816, 820–821.) "In keeping with California's strong public policy in favor of arbitration, any doubts regarding the validity of an arbitration agreement are resolved in favor of arbitration." (*Id.* at p. 821.) The party opposing the petition bears the burden of showing unconscionability. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.)

In this case, the trial court found that ISC had made its case for the existence of an arbitration agreement. The burden therefore shifted to Daye to show why the agreement should not be enforced. The court found the agreement both procedurally and substantively unconscionable, the latter finding based on the lack of discovery provisions in the AAA rules comparable to those in the Code of Civil Procedure. The court found two other provisions substantively unconscionable, but ruled that these provisions could be severed from the agreement. It denied the petition to compel arbitration.

I. Existence of Agreement to Arbitrate

In her respondent's brief, Daye takes issue with the trial court's finding of an agreement to arbitrate. She did not file a cross-appeal on this issue, but we may review it under Code of Civil Procedure section 906, which provides in pertinent part, "The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the reviewing court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken." In this case, if there was no agreement to arbitrate in the first place, ISC could not have been prejudiced by a finding that the agreement was unconscionable.

Daye bases her objection to the existence of the agreement on two grounds. The first is that the agreement does not cover her Labor Code violations alleged in the complaint. We agree with the trial court that the agreement covers the present dispute, because, as the trial court stated, "the work [Daye] performed for which she now seeks wages was part of her school curriculum. She was required to perform the work in order to graduate." The arbitration clause covered "any dispute arising out of enrollment at Toni & Guy Hairdressing Academy, no matter how pleaded or styled." "Arising from" in arbitration agreements is given a broad interpretation. (See *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1322, and cases cited.) Daye's claims of underpayment for the work she did while a student arose from her enrollment in the school. These claims would not exist if she had not been enrolled there. That she might also have been doing work – like washing mirrors – not immediately applicable to her cosmetologist's license does not alter the fact that the dispute arose from her enrollment at the school.

Daye's second objection to the existence of the agreement is the incorporation by reference to the AAA's Commercial Rules in the arbitration clause.[2] There was some question at the hearing on ISC's petition about the applicable rules. The arbitration provision specified AAA's Commercial Rules. Apparently the AAA itself requires the use of its Consumer Arbitration Rules when the contract in question is a private school enrollment agreement. At oral argument, ISC agreed the Consumer Rules apply.

An agreement requires parties capable of contracting, consent, a lawful object, and consideration. (Civ. Code, § 1550.) All of these elements were present in the enrollment agreement between Daye and ISC. Even if AAA later insists on using the Consumer Rules in a subsequent arbitration, the parties' agreement is not affected. (See

[2] We grant ISC's request to take judicial notice of the AAA's Commercial and Consumer Rules.

Marshall & Co. v. Weisel (1966) 242 Cal.App.2d 191, 196.) Moreover, Daye has not explained how using the Consumer Rules instead of the Commercial Rules would vitiate the agreement between her and ISC. We agree with the trial court that ISC met its burden to show the existence of the agreement.

II. Unconscionability

Unconscionability as it pertains to contracts has both a procedural and a substantive element. Procedural unconscionability focuses on oppression or surprise due to unequal bargaining power. A substantively unconscionable agreement is overly harsh or one-sided. Both procedural and substantive unconscionability must be present – although not necessarily in the same degree – to allow a court to refuse to enforce a contract. (*Baltazar v. Forever 21, Inc.* (2016) 62 Cal.4th 1237, 1243.)

As our Supreme Court has stated, "The unconscionability inquiry is not a license for courts to impose their renditions of an ideal arbitral scheme. Rather, in the context of a standard contract of adhesion setting forth conditions of employment, the unconscionability inquiry focuses on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable, and thereby 'effectively blocks every forum for the redress of disputes, including arbitration itself.' [Citation.]" (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1148.)

A. Procedural Unconscionability

Because the arbitration clause is contained in a contract of adhesion – one presented on a take-it-or-leave-it basis – the clause is by definition procedurally unconscionable. (See *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100.) The trial court also found other indicia of procedural unconscionability, such as the failure to set the clause off from other portions of the text, its confusing position under the heading "Placement," and the immediate proximity of another paragraph in all capitals on a

completely different subject, all of which support a finding of surprise.[3] (See, e.g., *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1252-1253.)

We agree that the arbitration provision is procedurally unconscionable, as part of a contract of adhesion. ISC, however, had no obligation to call the provision to Daye's attention or to highlight it. Nor is it unreasonable to expect a party to read a written agreement before signing it. (See *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 914.) The degree of procedural unconscionability is thus relatively low.

"[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 469, abrogated on other grounds, as stated in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 360.) We now look at the claims of substantive unconscionability.

B. Substantive Unconcionability

The trial court found three instances of substantive unconscionability in the agreement. Two of them – a purported limitation on recovery and an arbitration fee requirement – could be severed without compromising the "central purpose" of the arbitration agreement.[4] Indeed, ISC had already undertaken to pay all arbitration fees over AAA's $200 filing fee.

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[3] The court also mentioned that the AAA rules were not attached, although it did not appear to consider this omission procedurally unconscionable. Not attaching the rules does not of itself render the agreement unconscionable. Courts have found agreements referring to, rather than attaching, the rules substantively unconscionable when something in the rules themselves disadvantageous to the weaker party was "'artfully hidden.'" (See *Baltazar v. Forever 21, Inc., supra,* 62 Cal.4th at p. 1246.)

[4] Immediately after the arbitration clause, the enrollment agreement provided, "Any holder of this consumer credit contract is subject to all claims and defense [*sic*] which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery thereunder by the debtor shall not exceed amounts paid by the debtor thereunder." Daye claimed this provision would limit her recovery against ISC. ISC in turn maintained that it applied only to third-party assignees of the contract. Whatever it means, we agree with the trial court that to the extent the provision would apply to an arbitration, it could be severed.

The trial court found the provision substantively unconscionable because the AAA Commercial Rules did not provide for discovery other than document production. Unlike the other two instances, this feature of the arbitration provision was not severable. ISC argued that AAA would employ the Consumer Rules, not the Commercial Rules, but the Consumer Rules likewise specifically provide only for document production. Like the Commercial Rules, they are silent regarding other forms of discovery.

The AAA Consumer Rules regarding "exchange of information between parties" provide (1) that the arbitrator may direct the parties to share "specific documents and other information" and identify their witnesses, (2) that the parties must exchange their hearing exhibits at least five business days before the hearing, (3) the arbitrator may order "further information exchange" if needed "to provide a fundamentally fair process." The Consumer Rules explicitly direct the arbitrator to "keep[] in mind that arbitration must remain a fast and economical process[.]" The AAA Commercial Rules likewise focus on "achieving an efficient and economical resolution of the dispute while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses." The specific pretrial exchanges between parties mentioned in the Commercial Rules all relate to document production.

The United States Supreme Court used discovery restrictions in arbitration agreements to illustrate how the unconscionability doctrine can be deployed to thwart the FAA: "[T]he inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. . . . We said that a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.' [Citation.] [¶] An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer

arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are [not] difficult to imagine . . . . A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory – restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. [Citation.] And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to 'any' contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well." (*AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 341-342 (*Concepcion*).)

Here the trial court found the failure of the AAA rules to provide for discovery other than document production to be substantively unconscionable. This is precisely the kind of "disproportionate impact on arbitration agreements" against which the Court warned in *Concepcion.*

Discovery is not an end in itself. It serves trial preparation, in order to promote settlement and to eliminate the sporting theory of litigation. (*Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107.) The limitation on discovery in arbitration and the arbitrator's ability to rigorously control the process – control a busy trial judge could not possibly exercise – are features that make arbitration cheaper, faster, and more efficient than court. In fact, considering how discovery is often conducted in court cases, they may be the main source of arbitration's economy, speed, and efficiency.

And, the trial court's categorical assertion that arbitrators acting under the FAA do not have the power to issue pretrial subpoenas for witnesses and document production is overstated. (See *Security Life Ins. Co. of Am. v. Ducanson & Holt* (8th Cir. 2000) 228 F.3d 865, 870-871; *Stanton v. Paine Webber Jackson & Curtis, Inc.* (S.D.Fla.

1988) 685 F.Supp. 1241, 1242-1243 and cases cited.) Although the Ninth Circuit apparently has not spoken on this issue, the circuit courts that have addressed it disagree as to whether the FAA affords arbitrators this power, some finding it implicit in the authority granted by 9 U.S.C. section 7.[5] (See *Golden State Bank v. First-Citizens Bank & Trust Co.* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 158905 (EDCV 10-526-GW(OPx), Jul. 7, 2011) *15-17.)

One of the main advantages of arbitration is that parties must justify the use of discovery processes that the court system would allow them to use indiscriminately, without any oversight as to their relative costs and benefits. Daye's case appears to be one resting primarily on documents: time cards, wage statements, paychecks, receipts, work schedules. Daye's counsel, however, stated that Daye would need to take depositions of Toni & Guy management, faculty, students, and clients, to the tune of 10 or more depositions. Daye's counsel presented no evidence that AAA arbitrators working under the FAA in California could not accommodate requests for depositions, should they prove necessary. An arbitrator would not need subpoena power to compel Toni & Guy management and employees to appear for depositions, and Daye presented no evidence that the testimony of other necessary witnesses would not be available to her.

For substantive unconscionability purposes, the point is that the AAA rules regarding discovery apply equally to both Daye and ISC. If Daye cannot take depositions, neither can ISC. The rules allow both Daye and ISC to apply to the

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[5] 9 U.S.C. section 7 provides, "The arbitrators selected either as prescribed in this title [9 USCS §§ 1 et seq.] or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

arbitrator to conduct additional discovery. If the arbitrator lacks the power to compel nonparties to attend depositions under the FAA, both Daye and ISC will have to do without. Daye has presented neither evidence nor argument to support an inference that any discovery limitations disadvantage her more than ISC or disadvantage her in ways they do not disadvantage ISC. The substantive unconscionability analysis concerns itself with a level playing field; so far as the evidence presented here indicates, the discovery field is level.

The other purported instances of unconscionability Daye has cited on appeal are baseless. She claims that because ISC did not sign all the pages of the enrollment agreement, but only the second page, the agreement is not enforceable against ISC. As ISC is the one relying on the agreement to compel arbitration, this argument does not really merit discussion. Daye's other instance was that the arbitration fees exceed her ability to pay. Inasmuch the trial court has severed any agreement requiring Daye to pay more than she would have to pay in a court case and ISC has agreed to pay the arbitration fees over $200, this argument too is unavailing.

DISPOSITION

The order denying the petition to compel arbitration is reversed, and the matter is remanded to the trial court with instructions to grant the petition after severing

the portions of the arbitration provision found substantively unconscionable but severable. Appellant's request for judicial notice is granted. Appellant is to recover its costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.